

Top Takeover Defense Changes of 2020

January 2021

Deal Point Data continuously tracks changes to corporate charters and bylaws for key governance and takeover defense changes. The public health impact of the COVID-19 pandemic led to an increase in changes to governing documents in 2020 including numerous companies making the changes necessary to facilitate virtual shareholder meetings. The pandemic's effect on equity market valuations also led many companies to revisit an old standby takeover defense - poison pills. Meanwhile, among other defense changes, the rate of adoption of two shareholder friendly provisions has substantially declined while companies continue to take steps to defend themselves from shareholder lawsuits. In this note, we will highlight a few observations of Deal Point Data's takeover defense change and disclosure data for S&P 1500 companies in 2020.

Active Year for Bylaw Changes

S&P 1500 companies made 947 charter and bylaw filings during the year. This represents a 13% increase over 2019 filing levels. Most of the increase came from bylaw amendments where companies generally include provisions related to the holding of shareholder meetings (e.g., the location of the meeting, allow remote communication). As governmental stay-at-home orders were issued and companies determined that "in person" shareholder meetings could not safely be held, companies made the necessary changes to facilitate the holding of virtual shareholder meetings. 130 S&P 1500 companies filing bylaw amendments during the year specifically disclosed they were related to "virtual" or "remote" meetings. Overall, approximately 28% of S&P 1500 companies disclosed at least one bylaw change during the year.

2020 S&P 1500 Charter and Bylaw Filing Activity

	Filings	Companies	Stockholder Approved	% Approved	2019 Filings	2019 Companies
All Charter Filings	377	199	N/A	N/A	362	197
Change	194	163	123	63%	191	160
Initial (e.g. IPO/Spinoff)	9	6	N/A	N/A	7	7
Restated Only	31	29	N/A	N/A	43	41
Refiling	143	54	N/A	N/A	121	47
All Bylaw Filings	570	432	N/A	N/A	479	354
Change	499	418	19	4%	394	337
Initial (e.g. IPO/Spinoff)	6	6	N/A	N/A	7	7
Restated Only	30	26	N/A	N/A	33	33
Refiling	35	33	N/A	N/A	45	31

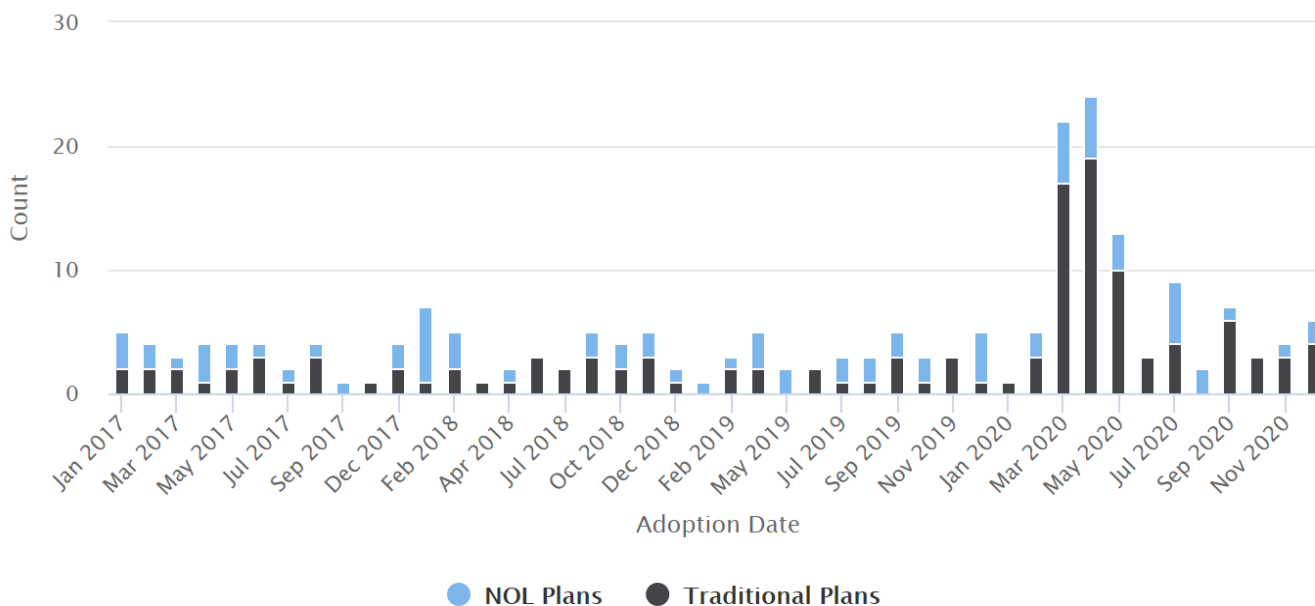
Based on filing date. Companies in index on December 31 of each year.

Covid-19 Rights Plan ("Poison Pill") Resurgence

We have previously written about the trend away from long-term "routine" poison pills to limited focus tools to serve a specific purpose during a specific time of need. What we witnessed in 2020 perfectly illustrates this trend. The substantial decline in equity markets from mid-February through March left many companies feeling vulnerable to opportunist acquirers and activist investors and they responded by adopting poison pills. March and April were the two most active months for poison pill adoptions since we began tracking this activity on January 1, 2017. In April alone, 24 U.S. headquartered companies adopted poison pills. Prior to 2020, our previous most active month had been January 2018 with seven adoptions. Overall, the volume of poison pill adoptions jumped by 183% compared to 2019 levels. Most of the company's adopting traditional poison pills in 2020 (i.e., excluding net operating loss carryforwards protection plans "NOL plans") set limited durations for the plans. 33 out of the 36 traditional poison pills adopted in March and April had a term of one year or less (the remaining three had three-year terms). During the entire year, only one poison pill out of 99 adoptions was the ten-year/non-shareholder approved anti-takeover type poison pill of old. As stock prices rebounded, the rate of poison pill adoptions began to decline and are returning to comparable levels from recent years.

Poison Pill Adoption Volume Type

Country Headquarters: United States



Deal Point Data

Defense Changes

Some perennial top defense changes remained so in 2020. Amendments to advance notice requirements and the adoption of "exclusive forum provisions" were once again among the top changes made by companies of all sizes. Advance notice changes was the top defense change for large cap companies (i.e., S&P 500 companies) while the adoption of state exclusive forum provisions was the third most common defense change for large caps and second and fourth most common among mid and small-cap companies (i.e., S&P 400 and 600). While "state" forum provisions designating a specific state court as the exclusive forum for all intra-

corporate disputes have been commonly included in the governing documents of U.S. public companies for nearly a decade, federal forum provisions ("FFP") are a recent innovation. FFPs require the federal courts be the exclusive forum for the resolution of Securities Act claims. Numerous companies adopted FFPs after the Delaware Supreme Court upheld their legality in March 2020. The adoption of FFPs was a top 10 change for all three groups of companies and was the top change for small-cap companies during the year.

	2017	2018	2019	2020	Decline from 2017
Add Proxy Access	112	64	57	35	-69%
Adopt Majority Standard in Director Elections	61	32	30	21	-66%

Based on effective date of defense change. Companies in S&P 1500 on December 31 of each year.

The adoption of proxy access rights and replacing plurality vote standards to elect directors with a majority standard have been among the most frequent changes for U.S. public companies in recent years. However, the frequency of each hit multi-year lows in 2020. The number of S&P 1500 adopting proxy access declined from 112 companies in 2017 to 35 in 2020. The adoption of majority voting declined from 61 companies in 2017 to 21 in 2020. The decline in majority voting changes can largely be attributed to the number of companies that have already made this change. As of January 2021, only 4.8%, 17.3%, and 30.3% of S&P 500, S&P 400, and S&P 600 companies respectively still utilize a pure plurality standard to elect directors (i.e., have not adopted a majority or "plurality plus" approach). The decline in proxy access rates is more surprising because while large caps have largely moved on this issue (i.e., approximately 80% of S&P 500 allow some form of access to the ballot), the ranks of small and mid-cap companies allowing proxy have grown but still represents only a minority of these companies (i.e., 28% of S&P 400 and 13% of the S&P 600 companies). One possible reason for the slow pick-up among these companies may be the lack of pressure via the 14a-8 shareholder proposal process. 57 U.S. reporting companies voted on proxy access shareholder proposals in 2017. That number declined to 14 in 2020. More importantly, these proposals which had been requests to adopt proxy access have increasingly evolved to proposals to amend existing proxy access bylaws (so called "fix-it" proposals). Only one of the proposals in 2020 sought the adoption of proxy access, the remaining were all "fix-it" requests.

More Attention to Director Removal Provisions

The rate of changes to provisions related to the shareholder's ability to remove directors increased from 2019 levels and was a top ten change for all three groups of companies in 2020. While the removal of supermajority provisions including requiring more than a simple majority to remove directors has long been in the crosshairs of governance activists, "cause" requirements for removal has not received much attention. That appears to be changing and some of the companies removing this defense in 2020 did so in response to proposals to allow removal of directors by shareholders with or without cause.

Resilient Classified Boards

One last and surprising observation is the fact that the elimination of classified boards in favor of annually elected directors remains a top defense change for small and mid-cap companies. Efforts by governance activists in the 1990s and early 2000s led to all but a limited number of large companies and most small and mid-cap companies to provide for declassified boards. However, despite widespread support for annually elected boards among shareholders, approximately one-third of small and mid-cap companies continue to stagger their board terms. A few factors may be contributing to this. First, smaller companies may perceive they are more vulnerable to threats from activists and unfriendly acquirers and conclude that the benefits of maintaining a staggered board exceed the negative perception associated with it from a governance best practices perspective. Smaller companies are also more likely to include younger companies including companies that completed an IPO in recent years. Recent IPO companies are more likely to have classified boards than existing public companies. For example, 60% of the non-SPAC U.S. IPOs completed in 2020 went public with a classified board in place.

Top Defense Changes - S&P 500

Defense	Total	Stockholder Approved	% Approved	2019 Total	YoY % Change
Add/Modify Advance Notice Disclosure/Eligibility Requirements	31	1	3%	24	22.6%
Add Proxy Access	20	0	0%	26	-30.0%
Add Exclusive Forum Provision	15	1	7%	12	20.0%
Add/Modify Advance Notice Timing	15	2	13%	16	-6.7%
Add Shareholder Ability to Call Special Meetings	13	4	31%	4	69.2%
Decrease % Requirement to Call Special Meetings	13	5	38%	8	38.5%
Add Federal Forum Provision	12	0	0%	0	100.0%
Eliminate Supermajority: Charter Amendments	10	9	90%	11	-10.0%
Eliminate Cause Requirement to Remove Directors	9	6	67%	3	66.7%
Eliminate Supermajority: Bylaws Amendments	7	7	100%	8	-14.3%
	145	35	24%	112	22.8%

Top Defense Changes - S&P 400

Defense	Total	Stockholder Approved	% Approved	2019 Total	YoY % Change
Eliminate Classified Board	12	12	100%	5	58.3%
Add Exclusive Forum Provision	9	0	0%	8	11.1%
Add Federal Forum Provision	9	0	0%	8	11.1%
Eliminate Cause Requirement to Remove Directors	8	6	75%	3	62.5%
Eliminate Supermajority: Bylaws Amendments	7	7	100%	5	28.6%
Eliminate Supermajority: Director Removal	7	6	86%	5	28.6%
Add Proxy Access	6	1	17%	20	-233.3%
Add/Modify Advance Notice Disclosure/Eligibility Requirements	6	0	0%	11	-83.3%
Add/Modify Advance Notice Timing	6	0	0%	4	33.3%
Eliminate Supermajority: Charter Amendments	6	6	100%	4	33.3%
	76	38	50%	73	3.9%

Top Defense Changes - S&P 600

Defense	Total	Stockholder Approved	% Approved	2019 Total	YoY % Change
Add Federal Forum Provision	23	1	4%	0	100.0%
Add/Modify Advance Notice Disclosure/Eligibility Requirements	22	1	5%	20	9.1%
Add/Modify Advance Notice Timing	19	0	0%	14	26.3%
Add Exclusive Forum Provision	17	1	6%	16	5.9%
Eliminate Classified Board	16	16	100%	10	37.5%
Adopt Majority Standard in Director Elections	12	3	25%	18	-50.0%
Eliminate Cause Requirement to Remove Directors	10	7	70%	1	90.0%
Add Proxy Access	9	0	0%	11	-22.2%
Add Shareholder Ability to Amend the Bylaws	8	5	63%	4	50.0%
Eliminate Supermajority: Bylaws Amendments	8	5	63%	9	-12.5%
Eliminate Supermajority: Director Removal	8	6	75%	1	87.5%
	152	45	30%	104	31.6%

Based on effective date of defense change. Companies in index on December 31 of each year.

About Deal Point Data

Deal Point Data is transforming the way M&A, securities and corporate governance research is done.

Deal Point Data streamlines the process of identifying precedents and analyzing market trends.

Our data-driven applications enable the world's leading law firms and investments banks to save countless hours of manual research while getting answers faster than ever.